Supreme Court of the United States

OCTOBER TERM, 1940.

No. 463.

CHARLES J. WOLFE, *Petitioner,*

vs.

C. F. MURPHY, ET AL., *Respondents.*

BRIEF IN SUPPORT OF RESISTANCE.

I.

It is assumed that the petition is based on that part of Subsection 4 (b) of Rule 38 of this Court which provides that a writ of certiorari may at the Court's discretion issue where a Circuit Court of Appeals has "decided an important question of local law in a way probably in conflict with applicable local decisions."

Neither the petition nor the brief in support of it makes very clear what "question of local law" has been decided "in a way probably in conflict with applicable local decisions."

The brief specifies what purports to be one error: that the Circuit Court of Appeals erred in adjudging that "both on grounds of a logical interpretation of Iowa statutes and on the authority of Iowa statutes, that plaintiff's cause of action for malicious prosecution accrued on Oct. 20, 1932, and that when finally commenced it was barred by the two year Statute of Limitations" and "that the judgment of the District Court dismissing the case on that ground was right and it is affirmed." Petitioner's Brief, page 7.

II.

Petitioner in his argument (page 8) erroneously says that the question which took most of the Court's attention "was whether or not the appellant was discharged from custody by an entry on the calendar of the Court and whether a *nunc pro tunc* order could be entered in the manner in which it was entered."

This is entirely inaccurate. *No one claimed nor did either the District Court or the Circuit Court of Appeals hold that "the appellant was discharged from custody by an entry on the calendar of the Court."* The defendants at the trial and on appeal contended, and both Courts held, *"that he was discharged by reason of the fact that he was not indicted by the grand jury to which he was bound over and no later grand jury had any right or power in the premises except by the commencement of a new proceeding."*

Again petitioner erroneously states the issue in his petition (Division II, page 3):

"THE FOLLOWING QUESTION IS INVOLVED"

"The effect of a *nunc pro tunc* order issued by the Iowa Court which acted to immediately cut off petitioner's right to bring his action by reason of setting in motion the Statute of Limitations at a date long preceding the date of such order."

As we have already stated it was not the theory of the defendants or the theory of the Courts that the *nunc pro tunc* order was necessary in order to set the Statute of Limitations in operation as of the date of the proceedings in 1932.

The contention of respondents was twofold but neither contention was as stated by petitioner. We desire more particularly to call this Court's attention to the Iowa au-

thorities which sustain the decision of the trial Court which was affirmed by the Circuit Court of Appeals.

(1) Our statutes make it reasonably clear that the grand jury to which a defendant is bound over has but two alternatives in disposing of the case: either to find an indictment when all the evidence taken together is such as in the judgment of the grand jury, if unexplained, would warrant a conviction by the trial jury *(Code Section 13717)*; or

If upon investigation the grand jury refuses to find an indictment it shall return all of said papers to the Court with an endorsement thereon, signed by the foreman, to the effect that the charge is dismissed and thereupon the Court must order the discharge of the defendant. *(Code Section 13722)*.

A later code section provides: when a person is held to answer to a public offense if an indictment be not found against him at the next regular term of the Court at which he is held to answer, the Court must order the prosecution to be dismissed unless good cause to the contrary be shown *(Code Section 14023)*.

We contend that these Code sections have been construed to mean that if the grand jury fails to indict, even though it does not technically report "No Bill," the result is in fact a dismissal of the prosecution unless the Court upon good cause shown directs that the charge be again submitted to the grand jury, in which case the defendant would be continued in custody or on bail until the next term of Court according to the provisions of Code Section 13722. As to the effect of these Code sections where no indictment is found and no technical report dismissing the charge has been returned by the grand jury, see:

State v. Brown, 128 Iowa, 24; Point 5 on page 27.
Rector v. Smith, 11 Iowa, 302.

An examination of these Code sections and these cases we believe will convince the Court that there has been in the instant case no decision of any question of local law in any way in conflict with applicable local decisions and surely not in conflict with general law:

> "Any mode of termination is sufficient (for the purpose of a malicious prosecution action) which constitutes a bona fide and final determination on the merits, or which amounts to such disposition of the proceedings as to render them incapable of being revived, so that proceedings will have to be instituted *de novo*."
>
> 38 Corpus Juris, 440 (Title "Malicious Prosecution," § 89).

> "A failure or refusal of the grand jury to indict, followed by the discharge of the accused, is in general a sufficient determination of the proceedings, although there may be no formal order of discharge by the Court."
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> 38 Corpus Juris, 443 (Title "Malicious Prosecution," § 94).

(2) Respondents also contended both in the trial Court and in the Court of Appeals that the entry of the state Court made Oct. 6, 1937, was important and significant for two reasons:

(a) It was effective as a *nunc pro tunc* order made by the state Court on Oct. 6, 1937, making of record in that Court what actually transpired on Oct. 20, 1932. This is not the equivalent of saying that the entry made Oct. 6, 1937, gave validity and effect to the transactions of Oct. 20, 1932. Under the decisions in Iowa, as well as elsewhere we believe, the very purpose of a *nunc pro tunc* entry is to correct the record and make it speak the truth. It is peculiarly appropriate in a case where the Clerk has failed to enter the judgment declared by the Court. In our resistance we have cited cases to this proposition. In the case of *Doughty v. Meek*, the Iowa Court was asked to enjoin the

sale of real estate under a general execution, plaintiff claiming there was no valid judgment upon which an execution could issue for the reason that no judgment had actually been entered by the Clerk up to the time the execution was sued out. Upon the trial of the case the Court ordered an entry of judgment *nunc pro tunc* but being of the opinion that no judgment had been rendered prior to that time enjoined proceedings under the writ of execution which had been issued prior to the *nunc pro tunc* entry. The Supreme Court reversed the lower Court and held that the writ of execution was valid just the same as if the entry of judgment had been made at the time when it should have been made. In other words, the judgment *nunc pro tunc proved* that a judgment had in fact been entered at the earlier date. See:

Doughty v. Meek, 105 Iowa, 16.

The other cases cited abundantly bear out the proposition that when the rights of third persons are not involved, as between the original parties a *nunc pro tunc* entry is only a device to make the record show what the Court in fact *did* in the case at the earlier date.

> "Except as to the rights of third parties, a judgment *nunc pro tunc* is retrospective and has the same force and effect, to all intents and purposes, as if it had been entered at the time when originally entered."
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> *34 Corpus Juris*, 81 (Title "Judgments", § 222).
> *Mahaska County v. Bennett*, 150 Iowa, 216, at p. 219.

In the last cited case the Court also says:

> "Though the minutes in the judge's calendar form no part of the record, they are receivable in evidence in the absence of a record as tending to show the judgment actually rendered." (P. 218).

(b) But the order of the state Court made October 6, 1937, was more than a mere *nunc pro tunc* entry correcting the record. It was an *adjudication* of the legal effect to be given the proceedings of October 20, 1932. It was made upon Wolfe's own motion asking that Court to "investigate all the procedure relative to the above entitled cause and making a finding and determination in accordance with the actual facts and the conclusions to be drawn therefrom." (R. 9) The Court making it had jurisdiction of the persons and subject matter. It was never appealed from. It irrevocably defined the status of the criminal prosecution. It did not terminate that prosecution but held as a matter of law that the prosecution was terminated on Oct. 20, 1932. "The Court finds and determines that the effect of the action of the grand jury, together with the entry of the Court, was to completely discharge the said defendant and thereafter there was no action pending against the said defendant." (R. 11)

It seems clear that under the statutes and decisions of Iowa, as well as under the general rules of law, this petitioner could have commenced his action for malicious prosecution any time after Oct. 20, 1932. The Iowa Statute of Limitations is two years. If his action had been commenced at any time within that period, respondents would have been in no position to contend that his action was premature for the reason that the criminal proceedings against him were still pending.

We realize the merits of the case are not before the Court in this petition for a writ of certiorari but we have deemed it necessary to go into the merits to this extent in order to show that the Circuit Court of Appeals has not "decided an important question of local law in a way probably in conflict with applicable local decisions." We understand that is the sole ground urged by petitioner; in

fact, we know of no other ground which he could urge in favor of the issuance of a writ in this case.

Respectfully submitted,

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